Supreme Court, U.S.
FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-44

In The

Supreme Court of the United States

October Term, 1989

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent,

FRANCIE BURNHAM,

Real Party in Interest.

On Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

PETITIONER'S BRIEF ON THE MERITS

CECILIA LANNON
2022 Fourth Street
San Rafael,
California 94901
(415) 457-0770

Trial Counsel For Petitioner

RICHARD SHERMAN
Counsel of Record
VICTORIA J. DE GOFF
DE GOFF AND SHERMAN
1916 Los Angeles Avenue
Berkeley, California 94707
(415) 524-1840

Counsel for Petitioner in Supreme Court of the United States

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is service of process on a non-resident, while he is physically present in the forum state to visit his children, a sufficient basis by itself for the exercise of personal jurisdiction?

Traditionally, physical presence in a state was sufficient to confer personal jurisdiction over the defendant, if he was served while in the state. The question presented is whether that rule is still viable, in light of *Shaffer v. Heitner*, 433 U.S. 186 (1977), and related developments.

LIST AND DESIGNATION OF PARTIES

Francie Burnham began this action by filing a petition for legal separation in the California Superior Court. She was called the Petitioner, and Dennis Burnham was called the Respondent. Dennis Burnham then filed a petition for a writ of mandate in the California Court of Appeal. In that action, he was called the Petitioner and Francie Burnham was called the Real Party In Interest. Dennis Burnham is now the Petitioner in this court. To avoid any confusion, Dennis Burnham will be referred to as "Husband" and Francie Burnham as "Wife."

TOPICAL INDEX

Page

Opinions Below 1
Jurisdiction..... 2
Statement Of Facts And Procedural History..... 2
Summary of Argument 8

Argument

I. This Court Should Reject The Traditional Rule Of Transient Jurisdiction, Under Which Personal Service On A Non-Resident Defendant While He Is Present In The Forum Is A Sufficient Basis For Exercising Personal Jurisdiction..... 12
   A. The Traditional Rule Was Founded On An Erroneous Premise, and Has Outlived Any Utility It Once Had 12
      1. The Rule Is Based On Dicta In *Pennoyer v. Neff*..... 12
      2. A State's Power Over Property And Persons Within Its Borders Is Not The Fundamental Basis For Personal Jurisdiction..... 14
      3. As State Court Jurisdiction Over Non-Resident Defendants Has Been Expanded, There Is No Longer Any Need For The Rule Of Transient Jurisdiction..... 15
   B. The Development Of Jurisdictional Thinking Reflected In This Court's Decisions Over The Last Four Decades, Which Culminated In *Shaffer v. Heitner*, Points Unswervingly In The Direction Of Rejecting Transient Jurisdiction .. 16
   C. The Application Of The Traditional Rule Of Transient Jurisdiction Yields Extremely Unfair Results..... 23
   D. The Restatement Second, Conflicts of Law, Has Recently Recommended A Modification Of The Traditional Rule..... 25

TOPICAL INDEX (Cont.)

Page

E. Decisions Which Have Applied The Traditional Rule After *Shaffer* Do Not Provide An Adequate Justification For Retaining It 26
Conclusion 33
II. Personal Jurisdiction Should Never Be Predicated On Service On A Non-Resident Parent While He Is In The Forum To Visit His Children Because This Would Gravely Interfere With His Fundamental Right To Be Involved In Their Upbringing 33
Introduction 33
A. Whether A State Can Exercise Personal Jurisdiction Over A Non-Resident Defendant Depends, In Part, On The Impact That This Would Have On His Fundamental Rights 34
B. Allowing Personal Jurisdiction To Be Based On Service On A Parent While He Is Present In A State To Spend Time With His Children Is An Unwarranted Interference With His Fundamental Parental Rights And Conflicts With Strong Social Policy Designed To Further The Best Interests Of Children 36
1. The Due Process Clause Of The Fourteenth Amendment Protects The Right Of A Divorced Father To Be Involved In Raising His Children 36
2. All States Share The Strong Social Policy Of Encouraging Divorced Parents To Maintain An Ongoing Relationship With Their Children 38

TOPICAL INDEX (Cont.)

Page

C. Allowing Personal Jurisdiction To Be Based On Service While A Parent Visits His Children Would Produce Undesirable Results 40
1. Allowing Such Jurisdiction Places The Non-Resident Parent In An Intolerable Position And Undermines The Ability To Settle Marital Disputes 40
2. Application Of The Rule Husband Advocates Is Especially Necessary In The Present Case 41
D. State Court Decisions Which Have Upheld Transient Jurisdiction In A Family Law Context Have Not Given Any Reasons In Defense Of It 44
E. The Fact That Husband Arranged To Attend Business Events When He Came To Visit His Children Does Not Permit California To Exercise Personal Jurisdiction Over Him 46
1. When Husband Was Served, He Was In California To Spend Time With His Children 46
2. California Does Not Have Personal Jurisdiction Over Husband In Wife's Family Law Action, On The Basis Of His Few Business Contacts With California 46
Conclusion 49

TABLE OF AUTHORITIES

Page

DECISIONS

Amusement Equipment, Inc. v. Mordelt, 779 F.2d 264 (5th Cir. 1985) 17, 18, 30, 31

Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102 (1987) 10, 34

Bendix Autolite Corp. v. Midwesco Enterprises, 108 S.Ct. 2218 (1988) 10, 35

Bershaw v. Sarbacher, 40 Wash.App. 653, 700 P.2d 347 (Wash. Ct. App. 1985) 17, 45

Brookshire v. Brookshire, 89 N.C.App. 48, 365 S.E.2d 307 (N.C. Ct. App. 1988) 45

Browne v. Browne, 258 Ga. 636, 373 S.E.2d 367 (Ga. 1988) 44

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 30

Caban v. Mohammed, 441 U.S. 380 (1979) 37

Cariaga v. Eighth Judicial Dist. Court, 104 Nev.Adv.Ops. No. 82, 762 P.2d 886 (Nev. 1988) 24

Cornelison v. Chaney, 16 Cal.3d 143, 545 P.2d 264, 127 Cal.Rptr. 352 (1976) 47

Gant v. Gant, 254 Ga. 239, 327 S.E.2d 723 (Ga. 1985) 44

Grace v. MacArthur, 170 F.Supp. 442 (E.D. Ark. 1959) 23

Hanson v. Denckla, 357 U.S. 235 (1958) 31

Helicopteros Nacionales de Colombia v. Hall, 466 U.S 408 (1984) 47

Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (Ga. 1980) 17, 24, 26, 44

TABLE OF AUTHORITIES – Continued

Page

Hutto v. Plagens, 254 Ga. 512, 330 S.E.2d 341 (Ga. 1985) 44

In re Marriage of Malak, 182 Cal.App.3d 1018, 227 Cal.Rptr. 841 (Cal. Ct. App. 1986) 39

In re Marriage of Markowski, 50 Wash.App. 633, 749 P.2d 754 (Wash. Ct. App. 1988) 45

In re Marriage of Pridemore, 146 Ill.App.3d 990, 497 N.E.2d 818, 100 Il.D. 640 (Ill. Ct. App. 1986) 24, 45

In re Marriage of Stevenot, 154 Cal.App.3d 1051, 202 Cal.Rptr. 116 (Cal. Ct. App. 1984) 40

Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694 (1982) 32

International Shoe Co. v. State of Washington, 326 U.S 310 (1945) ..... *passim*

Jenkins v. Jenkins, 89 N.C.App. 705, 367 S.E.2d 4 (N.C. Ct. App. 1988) 45

Judd v. Superior Court, 60 Cal.App.3d 38, 131 Cal.Rptr. 246 (Cal. Ct. App. 1976) 39, 47

Kulko v. California Superior Court, 436 U.S. 84 (1978) 2, 11, 27, 36, 41, 43

Kumar v. Superior Court, 32 Cal.3d 689, 652 P.2d 1003, 186 Cal.Rptr. 772 (1982) 35, 38, 48

Lockert v. Breedlove, 321 N.C. 66, 361 S.E.2d 581 (N.C. 1987) 29, 45

Lehr v. Robertson, 463 U.S. 248 (1983) 37

May v. Anderson, 345 U.S. 528 (1953) 37

McCorkle v. City of Los Angeles, 70 Cal.2d 252, 449 P.2d 453, 74 Cal.Rptr. 389 (1969) 2

TABLE OF AUTHORITIES – Continued

Page

McGee v. International Life Ins. Co., 355 U.S. 220 (1957) 11, 46

Meyer v. Nebraska, 262 U.S. 390 (1923) 36

Michael H. v. Gerald D., 109 S.Ct. 2333 (1989) 37

Modlin v. Superior Court, 176 Cal.App.3d 1176, 222 Cal.Rptr. 662 (Cal. Ct. App. 1986) 47

Morris v. Morris, 91 N.C.App., 432, 371 S.E.2d 756 (N.C. Ct. App. 1988) 45

Nehemiah v. Athletics Congress of U.S.A., 765 F.2d 42 (3d Cir. 1985) 17, 23

Nutri-West v. Gibson, ___ Wyo. ___, 764 P.2d 693 (Wyo. 1988) 29

Pennoyer v. Neff, 95 U.S. 714 (1877) ..... *passim*

Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) 11, 47

Harold M. Pitman Co. v. Typecraft Software, 262 F.Supp. 305 (N.D. Ill. 1986) 17

Quilloin v. Walcott, 434 U.S. 246 (1978) 37

Rush v. Savchuk, 444 U.S. 320 (1980) 22

Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) 22, 23

Shaffer v. Heitner, 433 U.S. 186 (1977) ..... *passim*

Silverman v. Superior Court, 203 Cal.App.3d 145, 249 Cal.Rptr. 724 (Cal. Ct. App. 1988) 42

Skinner v. Oklahoma, 316 U.S. 535 (1942) 36

TABLE OF AUTHORITIES – Continued

Page

Stanley v. Illionois, 405 U.S. 645 (1972) 10, 27, 36

Swarts v. Dean, 13 Kan.App.2d 228, 766 P.2d 1291 (Kan. Ct. App. 1989) 45

Titus v. Superior Court, 23 Cal.App.3d 792, 100 Cal.Rptr. 477 (Cal. Ct. App. 1972) 39

Williams v. North Carolina, 317 U.S. 287 (1942) 34

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 30, 32, 35

CONSTITUTION AND STATUTES

United States Constitution

Fourteenth Amendment 36

United States Code

Title 28, section 1257(3) 2

California Civil Code

section 410.10
California Judicial Council Comments (West 1973) 46

section 4600 (Deering 1989 Supplement) 38

section 4607 (Deering 1989 Supplement) 42

sections 5150 et seq. (Deering 1984)
Uniform Child Custody Jurisdiction Act 39

section 5151(2) (Deering 1984) 39

section 5152 (Deering 1984) 39

TABLE OF AUTHORITIES – Continued

Page

SECONDARY AUTHORITIES

American Jurisprudence 2d Desk Book, Item 124 39

Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction*, 25 Vill. L. Rev. 38 (1979) 17, 23, 30

Degnan and Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 Hastings L.J. 799 (1988) 32

Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956) 14, 15, 16

Hazard, Jr., *A General Theory of State Court Jurisdiction*, 1965 Sup. Ct. Rev. 241 16

Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 Wash. U.L.Q. 671 24

Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 Wash. L. Rev. 479 (1987) 13

Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 Emory L.J. 729 (1981) 13, 17, 24

Restatement (Second) of Conflict of Laws (1989)

section 28 ..... 25, 49

section 28, comment b 25

TABLE OF AUTHORITIES – Continued

Page

Schlesinger, *Methods of Process in Conflict of Laws: Some Comments on Ehrenzweig's Treatment of Transient Jurisdiction*, in Leflar, *Transient Jurisdiction – Remnant of Pennoyer v. Neff – A Round Table*, 9 J. Publ. L. 281, 319 (1960) 13, 26, 33

Vernon, *Single Factor Bases of In Personam Jurisdiction – A Speculation on the Impact of Shaffer v. Heitner*, 1978 Wash. U.L.Q. 273 17

No. 89-44

In The

Supreme Court of the United States

October Term, 1989

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent,

FRANCIE BURNHAM,

Real Party in Interest.

**On Writ Of Certiorari To The
California Court Of Appeal,
First Appellate District, Division Five**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The trial court's original ruling was that California did not have personal jurisdiction over Husband. (JA 21-22.) It reconsidered that order, decided that personal jurisdiction existed, and denied Husband's motion to quash service. (JA 26.) The California Court of Appeal, First Appellate District, Division Five, upheld the trial court in an unpublished decision. (JA 34-35.)The California Supreme Court denied review. (Pet. App. D.)

JURISDICTION

The California Supreme Court denied Husband's petition for review on June 8, 1989. The California Court of Appeal decision is a final determination on the federal constitutional issue because it determined that California has personal jurisdiction over Husband. Under California law, Husband has no choice but to suffer a default judgment, or to enter a general appearance and defend on the merits, thus waiving his right to contest jurisdiction. *McCorkle v. City of Los Angeles*, 70 Cal.2d 252, 258, 449 P.2d 453, 74 Cal.Rptr. 389 (1969). Such a ruling is final for the purpose of this Court's jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, 195 n. 12 (1977). Jurisdiction of this Court rests upon 28 U.S.C. § 1257(3). *Kulko v. California Superior Court*, 436 U.S. 84, 90 n. 4 (1978).

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Husband and Wife married in 1976, and moved to New Jersey in 1977. (JA 5, 11.) Their two children were born in New Jersey, and the family lived there together, until the parties had marital difficulties and separated in 1987. (JA 5, 11-12.)

On July 8, 1987, Husband and Wife entered into a written marital settlement agreement in New Jersey. (JA 12, Doc. #4, Ex. A.) It disposed of all the issues which normally arise when a marriage is dissolved. (*Ibid.*) In particular, it provided for a division of marital property, alimony, custody of the children to Wife, reasonable and liberal visitation to Husband, and child support. (*Ibid.*)

[1] References to material that is not in the Joint Appendix will be designated as "Doc." This refers to the docket number of the document which Husband assigned to the pleadings as they appear chronologically in the California Superior Court file. The Chronological List of Relevant Docket Entries appears in the Joint Appendix on p. 1.

The agreement was to be construed and interpreted in accordance with New Jersey law. (JA 12, Doc. #4, Ex. A, p. 13, ¶21.) In the event that the parties could not agree on the specifics of visitation, the issue was to be submitted to the court in New Jersey. (JA 12, Doc. #4, Ex. A, p. 2, ¶1.)

When the parties separated, Wife wanted to move to California with the children. (JA 17, Doc. #6, Attachment p. 4, ¶9:24-27.) Husband insisted that they reach a complete agreement, before he would refrain from opposing Wife's desire to take their children to California. (Doc. #6, Attachment, p. 10, ¶ 20:19-23.) The marital settlement agreement provided that Husband would pay the relocation expenses for Wife and the children. (Doc. #4, Ex. A, p. 10, ¶12.) Shortly after executing the agreement, Wife moved to California with the children on July 14, 1987. (Doc. #6, Attachment, p. 23, ¶42.)

Husband continued to live in New Jersey. (JA 11.) On October 21, 1987, he filed an action for divorce in New Jersey. (Doc. #4, p. 3:19-22 and Ex. C.) He requested that the court dissolve the marriage and incorporate the parties' written agreement. (Doc. #4, Ex. C, p. 2.) At Wife's request, he did not serve her immediately. (Doc. #6, Attachment, Ex. "P".)

On January 5, 1988, Wife filed an action for legal separation in California. (JA 5.) The form used for this purpose requires the completion of a declaration concerning marital property. (JA 6, ¶5.) Wife did not check the box which would have stated that the parties' marital assets had been disposed of by agreement. (JA 6, Item 5b.) Instead, Wife requested the California court to determine the parties' marital property rights. (JA 6, Items 5d and 7e.) Wife's petition also requested the California court to set the amounts of child support, spousal support, and attorneys fees. (JA 6, Items 7c, 7d, 7f.) She requested the California court to award her sole custody of the children. (JA 6, Item 7a.) She did not request it to make any provision enabling Husband to exercise visitation rights. (JA 6, Item 7b.)

On January 24, 1988, Husband was personally served with Wife's action, when he was at Wife's home in California to see the children. (JA 7-8, 13, 25.) At that time, the children were ages 2 and 8. (JA 5.)

On April 12, 1988, Husband made a special appearance and filed a motion to quash service of summons, on the ground that California did not have personal jurisdiction over him because he lacked sufficient contacts with the state to satisfy due process. (JA 10.) New Jersey is where Husband works, votes, files state income tax returns, has a drivers license, registers his vehicles, and maintains all of his bank accounts and his business. (JA 12.) Husband has never been a resident or domiciliary of California. (JA 12, 13.) He has never voted in California and has never paid California state income tax. (JA 13.) He has never owned any real property or any personal property in California. (JA 13.) No marital property was ever located in California. (JA 13.)

According to Husband, his only contacts with California were the result of his agreement that Wife could move there with the parties' children. (JA 13.) Were it not for Husband's strong desire to continue to have frequent and ongoing contact with his children, he would not have been served in California. (JA 13.)

On June 23, 1988, Wife filed a legal memorandum in opposition to Husband's motion to quash. (Doc. #8.) It attached, for "informational purposes", copies of two lengthy affidavits and numerous exhibits, which she had previously filed in Husband's New Jersey divorce action. (Docs. #8, p. 2:17-20, #6, #7.) A few places in Wife's New Jersey affidavit referred to business that Husband would do in California, when he came there to visit the children. These portions are reproduced in the Joint Appendix. (JA 18-20.) In these pleadings, however, Wife did not rely on these contacts to establish jurisdiction. Nor did she claim that Husband had any actual business interests in California, or any contacts with California other than in

connection with his trips there to spend time with their children.[2]

Wife's position was that California had jurisdiction over Husband because he had been personally served, while he was present in California. (Doc. #8, pp. 1-2.) She also argued that New Jersey had recently dismissed Husband's divorce action, and it would be a hardship for her to litigate these issues in New Jersey. (Doc. #8, pp. 2-4.)

On June 30, 1988, the California Superior Court (trial court) held a hearing on husband's motion to quash. (Doc. #10.) The matter was argued and submitted without any testimony.

On September 8, 1988, the trial court signed and filed an order which nominally denied Husband's motion to quash. (JA 21-22.) That order actually granted Husband the substantive relief which he sought because it stated that it had "no personal jurisdiction over [Husband] over any other issue except marital status." (JA 21-22.)

---

[2] The length of wife's New Jersey affidavit is therefore misleading. (Doc. #6, Attachment.) Wife had filed it primarily to explain why the marriage broke down, and why the New Jersey court should set their agreement aside. Accordingly, it was not directed to the question of whether Husband had sufficient contacts with California to be subject to personal jurisdiction under a "minimum contacts" analysis.

The other New Jersey affidavit was by an attorney, Tracy Kirkham. (Doc. #7, Attachment.) The marital settlement agreement described her as having assisted the parties in mediating their agreement. (Doc. #4, Ex. A, p. 1, last ¶.) Ms. Kirkham's affidavit was limited to advancing grounds for setting the agreement aside, by claiming that she had not acted as Wife's lawyer. (Doc. #7, Attachment.)

The references in the affidavits to Husband's "certification" are to a pleading filed in the New Jersey action, which is not part of the record in the California action. See, e.g., Doc. #6, Attachment, p. 35, ¶ 65:27.

On September 16, 1988, Wife moved for reconsideration. (Doc. #13.) She filed a supporting legal memorandum, but no declaration. (Doc. #12.) Wife's motion expanded on her argument that California had personal jurisdiction over Husband because he was personally served while present in the state. (Doc. #12, pp. 4:14-6:20.) She also argued that Husband's trips, which combined his visits to see the children with some business meetings, were sufficient contacts for California to exercise personal jurisdiction over Husband because he was served while present in the state. (Doc. #12, pp. 6:21-8:19.)

On September 28, 1988, Husband filed a declaration and a legal memorandum in opposition to Wife's motion for reconsideration. (Docs. #15 and #16.) His declaration further explained that he does not have any license to do business in California, does not pay any sales tax in California, and does not have a business address in California. (JA 23-25.) Rather, his contacts with California all centered on visiting his children there. (JA 23-25.)

The hearing on Wife's motion to reconsider was held on September 30, 1988. (Doc. #17.) The trial court expressed concern about the question of whether service on Husband while he was present in California was a valid basis for personal jurisdiction, regardless of why he was there. It asked counsel if there were a California decision on this point. (Doc. #17, p. 6:21-23.) Neither counsel was aware of such a decision at that time. (Doc. #17, p. 6:24-28.)

On October 5, 1988, the trial court filed an order which vacated its prior order and denied Husband's motion to quash in its entirety. (JA 26.)

Husband moved for reconsideration after discovering a California appellate decision which involved a father who was personally served while he was present in the state to enforce his parental rights. (Doc. #20, Doc. #21, p. 4:12-25.) In that case, the California Court of Appeal upheld the trial court's order quashing service

based on lack of personal jurisdiction. (Doc. #21, p. 4:12-25.)

Wife filed an opposing legal memorandum, and another declaration. (Docs. #22 and #24.) This declaration elaborated on the relationship between Husband's visits with the children and his business contacts with California. (JA 27-29.) Wife also maintained that Husband had been in California on business at least once a year during the marriage, except in 1984. (JA 28.) He would also visit relatives in southern California. (JA 28.)

Husband filed a reply legal memorandum, and a declaration which further described the limited nature of his business contacts with California. (JA 30-32, Docs. #26 and #27.) He explained that he would try to arrange to attend business events in California, such as trade shows and lectures, when he came there to visit the children, in order to help defray the cost of his travel to spend time with them. (JA 30-31, 32.) In this manner, he could deduct some of his expenses for income tax purposes.[3] (JA 30-31, 32.)

The trial court held a hearing on Husband's motion for reconsideration on October 31, 1988. (Doc. #28.) On November 4, 1988, the trial court denied Husband's motion. (JA 33.)

On November 8, 1988, Husband filed a petition for a writ of mandate in the California Court of Appeal. The Court of Appeal denied the petition in an unpublished decision filed on April 7, 1989. (JA 34-35.) It stated that

---

[3] The conflict in the declarations concerning the nature and extent of Husband's business contacts with California is irrelevant. The California courts did not uphold jurisdiction on the basis that Husband was doing business in California. Moreover, as explained in section II.E. of the legal arguments, Husband's business contacts cannot constitutionally be a basis for exercising personal jurisdiction over him in Wife's marital litigation.

" . . . personal presence continues to be a valid jurisdictional predicate for *in personam* jurisdiction and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer*'s minimum contacts analysis to a defendant present in the forum state and personally served with process."[4] (JA 34.)

SUMMARY OF ARGUMENT

The rule of "transient" jurisdiction, which permits a state to exercise personal jurisdiction over a non-resident defendant who is personally served while present there, has its roots in dicta in *Pennoyer v. Neff*, 95 U.S. 714 (1877). *Pennoyer* adopted a very restrictive view of state court jurisdiction over non-resident defendants. It held that personal jurisdiction could not be exercised unless the defendant was personally served in the state. It also stated that all states do have power over property and persons within their boundaries. This second statement gave rise to the rule of transient jurisdiction.

The rule has long been criticized because it permits personal jurisdiction, regardless of whether it is fair to the defendant, and regardless of whether there is a nexus between the defendant, the facts giving rise to the lawsuit, and the state. On the traditional view, such considerations are irrelevant.

In recent years, it has come to be recognized that physical power over the defendant is not the basis for

---

[4] The Court of Appeal went on to note that the exercise of personal jurisdiction over Husband would not discourage visitation because he was present in California for the dual purpose of visitation and conducting business activities. (JA 35.) This was in response to Husband's argument that personal jurisdiction should never be based on service while a parent is present in the state to visit his children because that would unduly burden the exercise of parental rights.

personal jurisdiction. The landmark decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) rejected the approach to jurisdiction based on power. It thus overruled *Pennoyer's* limitation on personal jurisdiction over absent defendants. It shifted the focus of the jurisdictional inquiry to whether the defendant had sufficient contacts with the state to satisfy traditional notions of fair play and substantial justice.

Once it became possible to obtain personal jurisdiction over an absent defendant without the necessity of serving him while he was in the state, and once it was recognized that jurisdiction does not rest on power, the theoretical and practical rationale for the transient jurisdiction rule evaporated. Notwithstanding the unfairness generated by the rule, and the recommendations of commentators that it be rejected, state and federal courts continued to apply the doctrine.

Then, in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court held that a state could not assert jurisdiction based on the presence of the defendant's property in the forum state, so-called "quasi in rem" jurisdiction. The Court reiterated its rejection of the power theory of jurisdiction, and stated that **all** assertions of state court jurisdiction must satisfy substantial justice and fair play.

After *Shaffer*, the commentators almost unanimously recognized that transient jurisdiction was inconsistent with the trend of this Court's modern decisions. If jurisdiction no longer can be based on the presence of the defendant's property in the state, logic and fairness required that it could not be based on the mere presence of a person either. The Restatement (Second) of Conflicts of Law, has also recommended a modification of the traditional rule for these reasons.

Decisions which have applied transient jurisdiction after *Shaffer* have done so primarily because this Court has not expressly rejected it. The few attempts to provide a rational defense of the traditional rule are unpersuasive. The time has come for this Court to hold that service on the defendant while he is present in the state is not, by

itself, an adequate basis for the exercise of personal jurisdiction.

Rejecting the traditional rule, or at least modifying and limiting its applicability, is particularly appropriate on the facts here. Husband and Wife lived in New Jersey almost their entire married life. After they separated, they entered into a complete written marital settlement agreement in New Jersey. Wife then moved to California with their children and Husband remained in New Jersey. Husband was served at Wife's home, while he was present in California to visit their children.

In deciding whether a state can exercise personal jurisdiction over a non-resident defendant, one should consider the impact that this would have on the shared interests of the states in furthering fundamental substantive social policies. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). The validity of any procedure by which personal jurisdiction is obtained must also be evaluated in the light of its impact on the defendant's other constitutional rights. *Bendix Autolite Corp. v. Midwesco Enterprises*, 108 S.Ct. 2218 (1988). Mechanical application of the transient jurisdiction rule leaves no room for affording the proper weight to other constitutional interests. The effect of the failure to consider other fundamental rights is brought into sharp focus by the facts of this case.

Fundamental parental rights are protected by the due process clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645 (1972), and related decisions. There is also a strong social policy, promoted in every state of this nation, to encourage divorced parents to maintain an ongoing relationship with their children.

Predicating personal jurisdiction on service when a parent is present in a state to spend time with his children would seriously impede his fundamental parental right to be involved in raising his children, and would also gravely interfere with the important public policy of encouraging visitation.

For a variety of reasons, it would be particularly inappropriate to permit California to exercise jurisdiction in the present case. Husband only agreed that his children could move to California with Wife because the parties had settled all of their marital disputes in New Jersey. The gravamen of Wife's action is to have that agreement set aside, and to litigate all issues arising out of the breakup of the marriage in California. Allowing her to do this would be the antithesis of fair play and substantial justice. These issues should be litigated in New Jersey, which was the marital domicile, and where the agreement was executed. *Kulko v. California Superior Court*, 436 U.S. 84 (1978).

Finally, the fact that Husband combined his visits to see his children in California with attendance at trade shows and lectures related to his New Jersey business, cannot be a basis for upholding personal jurisdiction. Doing a limited amount of business in a state only permits personal jurisdiction for causes of action arising out of that business. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). Wife's lawsuit is unrelated to Husband's miniscule business contacts with California. Husband's business contacts were not "continuous, systematic or wide-ranging", which would be necessary to subject Husband to general personal jurisdiction for causes of action unrelated to them. *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952).

ARGUMENT

I. THIS COURT SHOULD REJECT THE TRADITIONAL RULE OF TRANSIENT JURISDICTION, UNDER WHICH PERSONAL SERVICE ON A NON-RESIDENT DEFENDANT WHILE HE IS PRESENT IN THE FORUM IS A SUFFICIENT BASIS FOR EXERCISING PERSONAL JURISDICTION.

A. The Traditional Rule Was Founded On An Erroneous Premise, And Has Outlived Any Utility It Once Had.

1. The Rule Is Based On Dicta In *Pennoyer v. Neff*.

The foundation for "transient jurisdiction" appears in the reasoning of *Pennoyer v. Neff*, 95 U.S. 714 (1877). The issue in *Pennoyer* was the validity of a judgment obtained in Oregon against a non-resident defendant. The Court held that the judgment was invalid because the defendant had not been personally served while he was present in Oregon. At 719. Therefore, Oregon did not have personal jurisdiction over him. The Court based this holding on what it described as " . . . two well-established principles of public law respecting the jurisdiction of an independent state over persons and property." At 722. First: "Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory." Second: "No state can exercise direct jurisdiction and authority over persons or property without its territory." *Ibid*.

These few sentences imposed a straight jacket on the concept of state court jurisdiction, from which it has taken over a century to escape. From the principles announced in *Pennoyer*, the view developed that because a state's jurisdiction is based on its "power" over persons and property inside its territory, service on a non-resident while he is present in the state not only is necessary for jurisdiction, but also by itself is a **sufficient** basis for jurisdiction. Thus was born the doctrine of "transient

jurisdiction", which some commentators have aptly described as "gotcha" jurisdiction.[5] See Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 Emory L.J. 729 (1981).

Significantly in *Pennoyer*, the plaintiff had tried to effect service on the defendant by publication, but failed to comply with the technicalities of the relevant Oregon statute. The defendant had not been personally served in Oregon. The Court could have disposed of *Pennoyer* by holding, as had the Oregon court, that the service by publication was defective, without implying that personal service in the state by itself would have been sufficient. Therefore, the rule of transient jurisdiction actually arose out of dicta. See Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 Wash. L. Rev. 479, 491-498 (1987).

Despite the venerable age of the transient jurisdiction rule, no decision by this Court has ever upheld it as constitutional, in a case where it was actually exercised. Therefore, rejection of the rule "is not foreclosed by any Supreme Court case directly in point." Schlesinger, *Methods of Process in Conflict of Laws: Some Comments on Ehrenzweig's Treatment of Transient Jurisdiction*, in Leflar, *Transient Jurisdiction – Remnant of Pennoyer v. Neff – A Round Table*, 9 J. Publ. L. 281, 319 (1960). As a result, although overturning the rule would break

---

[5] Wife's answer to Husband's petition for certiorari argued that this case does not involve transient jurisdiction because Husband was not caught while he was only "momentarily" in California, or just "passing through." This misses the point. The analytical basis for transient jurisdiction is the mere fact of personal service on the defendant while he was present in the state. That was the basis on which Wife argued California had jurisdiction here, and it is the basis on which the Court of Appeal upheld the exercise of jurisdiction. That California would not have personal jurisdiction over Husband if he had not been served there, is discussed in section II.E.

with a tradition that is more than a century old, it would not require that any decision of this Court be overruled.

2. A State's Power Over Property And Persons Within Its Borders Is Not The Fundamental Basis For Personal Jurisdiction.

In his seminal article, Professor Albert A. Ehrenzweig, a respected and influential critic of transient jurisdiction, demonstrated that the doctrine's theoretical foundation was the assumption that the right of a state to exercise jurisdiction over a defendant is based on the state's physical power. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289, 293-309 (1956). Ehrenzweig persuasively explains why the belief that physical power is the foundation of jurisdiction is "both factually unsupported and functionally unsupportable under modern conditions." At 296. His careful and detailed historical analysis will not be repeated here.[6]

Husband submits that part of the problem in freeing jurisdictional doctrine from the remaining constraints of *Pennoyer* is that the very question "does a state have jurisdiction?" is conceptually misleading. It suggests that a state might have jurisdiction in the same way that it has mountains and rivers. Thus, if a person or property is "in" the state, it "has" them, and has jurisdiction over them.

In truth, whether a court in one state "has jurisdiction" over a non-resident is only an elliptical way of asking whether, if the forum state allows the plaintiff to obtain a judgment against the non-resident defendant,

---

[6] In *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) the Court similarly recognized that power is not the basis for jurisdiction. The Court cited Professor Ehrenzweig's article, with apparent approval, in a related context in *Shaffer v. Heitner*, 433 U.S. 186, 205 (1977).

the state where the defendant lives and/or has assets must enforce that judgment. That question ultimately reduces to whether this Court would require the other state to honor the judgment. The answer turns on a fundamental policy decision which this Court must make: whether it is "right" for the forum state to allow a lawsuit against the non-resident defendant to proceed to a binding judgment. If this court concludes that it is right, then the forum has jurisdiction. If this Court concludes that it is not right, then the forum does not have jurisdiction.

In other words, whether a state "has jurisdiction" is a **conclusion** which follows from an analysis of whether it is fair and just to allow the forum to proceed against a non-resident defendant. It is not a **premise,** from which it follows that a court in the forum can proceed.

3. As State Court Jurisdiction Over Non-Resident Defendants Has Been Expanded, There Is No Longer Any Need For The Rule Of Transient Jurisdiction.

Transient jurisdiction originally had a certain utility, in view of the stringent restrictions *Pennoyer* had imposed on personal jurisdiction over non-resident defendants. *Pennoyer* made it almost impossible to obtain personal jurisdiction over someone who did not come to the state. The harshness of that rule was mitigated by allowing a plaintiff to maintain an action against a defendant who did come to the plaintiff's state. "When the law thus came to compel the plaintiff to 'catch' his defendant it quite consistently began to hold this feat sufficient for the establishment of jurisdiction." Ehrenzweig, *supra*, at 308.

This "symmetry" may have made practical sense in 1877. Most transactions were between residents of the same state. People did not travel casually from one state to, or through, another state, as they do today. Thus, it was reasonable to presume that a person who was in a state was there for more than a transitory purpose.

As a plaintiff's ability to obtain personal jurisdiction over a non-resident defendant has expanded, the need to allow a plaintiff to obtain jurisdiction over a person who is served while in the state has abated. As Ehrenzweig explains, " . . . the transient rule, declaring **sufficient** personal service within the state upon nonresidents sued by other nonresidents on foreign causes of action, is most easily explainable as a relic of the *Pennoyer* rule which declares such service to be **required** for the establishment of personal jurisdiction. Once this requirement, breaking down under an increasing number of 'exceptions', ceases to be valid, its creature the transient rule may have reached the end of its course and left the way open for a new approach, satisfying new needs." Ehrenzweig, *supra*, at 312.

The first step towards this new approach occurred when the Court, in *International Shoe, supra*, 326 U.S., at 316, overruled *Pennoyer's* limitation on personal jurisdiction over a non-resident defendant who was not served in the forum. It held that a state can exercise jurisdiction if the defendant had sufficient contacts with the forum to satisfy fair play and substantial justice. *Ibid.* As a result, the rationale for the rule of transient jurisdiction virtually evaporated. "Ever since *International Shoe, Pennoyer v. Neff* has been eligible for oblivion." Hazard, Jr., *A General Theory of State Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 281.

B. The Development Of Jurisdictional Thinking Reflected In This Court's Decisions Over The Last Four Decades, Which Culminated In *Shaffer v. Heitner*, Points Unswervingly In The Direction Of Rejecting Transient Jurisdiction.

In *Shaffer v. Heitner, supra*, 433 U.S., at 212, the Court stated that " . . . all assertions of state court jurisdiction must be evaluated by the standard set forth in *International Shoe* and its progeny." Thus, many commentators have persuasively argued that after *Shaffer*, service alone on a non-resident while he is physically present in a state

can no longer be constitutionally sufficient to permit the state to exercise personal jurisdiction over him. Rather, the question in all situations must be whether the non-resident has sufficient contacts with the state to make the litigation there appropriate. See, e.g., Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction*, 25 Vill. L. Rev. 38 (1979); Vernon, *Single Factor Bases of In Personam Jurisdiction – A Speculation on the Impact of Shaffer v. Heitner*, 1978 Wash. U.L.Q. 273, 303.

Virtually all commentators, both before and after *Shaffer*, have advocated abolition of transient jurisdiction. *Shaffer* and its progeny provide the theoretical framework for accomplishing this. See articles collected in Posnak, *supra*, notes 10 and 11 at 731, and commentary at 738-743. The court of appeals reached this conclusion in *Nehemiah v. Athletics Congress of U.S.A.*, 765 F.2d 42, 47 (3d Cir. 1985), as did the Washington Court of Appeal in *Bershaw v. Sarbacher*, 40 Wash.App. 653, 700 P.2d 347, 349, (Wash. Ct. App. 1985), and the district court in *Harold M. Pitman Co. v. Typecraft Software*, 262 F.Supp. 305, 310-313 (N.D. Ill. 1986).

Some courts have suggested that this statement in *Shaffer* cannot carry the weight which the commentators have given to it because neither *Shaffer*, nor *International Shoe*, involved personal service on a defendant who was present in the forum. See, e.g., *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22, 22-24, (Ga. 1980); *Amusement Equipment, Inc. v. Mordelt*, 779 F.2d 264, 268-269 (5th Cir. 1985). Consequently, before turning to the policy reasons for rejecting the traditional rule, Husband will discuss the underlying rationale of *International Shoe* and *Shaffer*. It will emerge that it is their shift in jurisdictional analysis, which requires rejecting transient jurisdiction.

International Shoe explained that power is not the basis for personal jurisdiction, in the following passage, quoted in many subsequent decisions:

> Historically, the jurisdiction of courts to render judgments in personam is grounded on their de facto power over the defendant's person. Hence,

> his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding. *Pennoyer v. Neff*, 95 U.S. 714, 733. But now that **capias ad respondendum** has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, **if he be not present within the territory of the forum,** he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.
>
> 326 U.S., at 316, emphasis added.

Those who argue in favor of retaining transient jurisdiction rely on the part of the above quotation which seems to suggest that the new rule announced in *International Shoe* would not be applicable, if the defendant were served while present in the forum. See, e.g., *Amusement Equipment, Inc. v. Mordelt, supra*, 779 F.2d, at 269. Immediately after this paragraph, however, the Court explained that because a corporate personality is a fiction, a corporation can only be present in a state by virtue of activities carried on in its behalf. It stated as follows, at 326 U.S., at 316-317:

> to say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or 'presence' are used merely to symbolize those activities of the corporation's agent in the state which courts would deem to be sufficient to satisfy the demands of due process.

It is therefore significant that *International Shoe* also stated: " . . . it has been generally recognized that the **casual presence** of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities

there." 326 U.S., at 317, emphasis added. The Court concluded that "whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure." At 319.

Thus, even if a corporation could be said to be technically "present" in a state, it does not necessarily follow that the corporation would be subject to jurisdiction. Rather, this depends on whether the corporation's contacts with the state, which gave it a "presence" there, were sufficient to satisfy fundamental concepts of fair play and substantial justice.

By analogy, an individual could be "present" in a state because he is driving through it on the way to somewhere else. From the point of view of fair play and substantial justice, such contacts with the state are no different from those of a corporation which has a technical presence. Yet, that is sufficient to allow the state to exercise personal jurisdiction over the individual defendant under the traditional rule.

The importance of *International Shoe* to the present inquiry, is therefore the following. Previously, in order to exercise personal jurisdiction over an out-of-state defendant, the courts had to analyze the situation in a manner which allowed them to conclude that the defendant was actually "present" in the state in some way. *International Shoe* exploded the myth of presence, and held that it is not the issue. Rather, the issue is whether the defendant had sufficient contacts with the state to make it fair and just to assert jurisdiction over it. It was thus the method of analysis adopted in *International Shoe*, which planted the seed for the destruction of the concept of transient jurisdiction.[7]

---

[7] Although *International Shoe* involved a corporate defendant, the Court has recognized that the same analysis applies to individuals. See *Shaffer*, 433 U.S., at 204, n. 19.

International Shoe bore some of its fruit in *Shaffer*. There, the Court took the next logical step by applying its insights to "quasi in rem" jurisdiction. *Shaffer*, of course, did not involve a defendant who had been personally served in the forum. As with *International Shoe*, it is the reasoning process of the decision which is critical.

In *Shaffer*, the plaintiff filed a stockholder's derivative suit in Delaware against Greyhound Lines, Inc. He claimed that the defendants had engaged in activities in Oregon which resulted in damages being assessed against Greyhound in an anti-trust action. The basis for his assertion of jurisdiction over the defendants was that they owned stock in the corporation, which was located in Delaware. Delaware held that, as a result, it could exercise "quasi in rem" jurisdiction over the defendants. "Quasi in rem" jurisdiction is based on attachment or seizure of property which is present in the jurisdiction, rather than on contacts between the defendant and the state. Delaware therefore considered the defendants' lack of contacts with the state to be unimportant, and upheld jurisdiction. 433 U.S., at 189-195.

This Court reversed. It started its analysis by stating that the reasoning of the Delaware court had assumed "the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff*, 95 U.S. 714 (1877)." 433 U.S., at 196. *Shaffer* went on to discuss that conceptual structure, and expressly rejected it.

Shaffer pointed out that under *Pennoyer*, a state's authority to adjudicate was based on its power over persons or property. 433 U.S., at 199. Accordingly, a state could not reach beyond its borders. Thus, *Pennoyer* generally favored non-residents by making it harder to sue them. 433 U.S., at 199-200. To ameliorate that difficulty, the courts had struggled to create legal fictions which would allow jurisdiction over out-of-state defendants, while leaving the conceptual structure established in *Pennoyer* theoretically unaltered. At 200-204.

This approach had ended with *International Shoe*, which rejected the creation of exceptions and directly held that power was no longer the central concern. Instead, " . . . the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of states on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." At 204.

Shaffer noted that "no equally dramatic change has occurred in the law governing jurisdiction in rem." At 205. Since "the law of state-court jurisdiction no longer stands purely on the foundation established in *Pennoyer*", the Court recognized that "the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions in rem as well as in personam." At 206. It went on to do precisely that, holding that the presence of property in a state is itself generally insufficient to give it jurisdiction over the property owner. At 207-212. *Shaffer* stated that "The case for applying to jurisdiction in rem the same test of 'fair play and substantial justice' as governs assertions of jurisdiction in personam is simple and straightforward. It is premised on recognition that '[t]he phrase, "judicial jurisdiction over a thing," is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." At 207.

After discussing the arguments in favor of retaining the traditional rule, the Court concluded that fair play and substantial justice "can be as offended by the perpetuation of ancient forms which are no longer justified, as by the adoption of new procedures which are inconsistent with the basic values of our constitutional heritage. The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant." At 212.

It was in the light of this theoretical shift in focus, that *Shaffer* stated all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. At 212. It also stated that "to the extent that prior decisions are inconsistent with this standard, they are overruled." At 212, n. 39.

The import of this broad holding was demonstrated by the next development in this area, when the Court applied the same analysis in *Rush v. Savchuk*, 444 U.S. 320 (1980). In *Rush*, Minnesota asserted quasi in rem jurisdiction by garnishing an insurance company's obligation under its contract to defend and indemnify a defendant who had caused an accident in Indiana. Minnesota exercised jurisdiction, even after this Court had remanded the case to it for reconsideration in light of *Shaffer*. At 324-325. Minnesota had simply followed the rule that New York had adopted in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), so-called *"Seider* jurisdiction". This Court reversed, and reiterated its holding in *Shaffer*, that **all** assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. The inquiry must focus on the relationship among the defendant, the forum, and the litigation. 444 U.S., at 327-333.

The theoretical methodology which the Court used to decide all these cases compels the conclusion that personal service on a nonresident while he is in the forum is no longer by itself constitutionally permissible as the basis for a state to exercise personal jurisdiction over the defendant. Such service was traditionally considered sufficient for the very reasons which *Shaffer* rejected. Traditionally, a state was said to have power over any person or property present within its territorial boundaries. *Shaffer* held that presence of property is not an adequate basis for quasi in rem jurisdiction.

By parity of reasoning, the physical presence of a non-resident in a state can no longer be deemed constitutionally sufficient to permit personal jurisdiction. The

question in all situations must be whether the non-resident defendant has sufficient contacts with the state to make it fair and just that he be required to defend against the litigation there.

Abolishing the doctrine of transient jurisdiction is simply the next logical step in the evolution of this court's decisions on jurisdictional questions. Just as state courts failed to draw the right implications from *International Shoe*, and then from *Shaffer* on the question of *"Seider"* jurisdiction, so too they have not recognized that *Shaffer* sounded the death knell for transient jurisdiction.

C. The Application Of The Traditional Rule Of Transient Jurisdiction Yields Extremely Unfair Results.

As the Third Circuit Court of Appeals noted in *Nehemiah v. Athletics Congress of U.S.A., supra*, 765 F.2d 42, at 47, it is difficult to find a basis in fairness for transient jurisdiction. Indeed, the traditional rule has led to the exercise of jurisdiction in a variety of situations that offend basic notions of fair play and substantial justice.

A leading article on this subject describes pre-*Shaffer* decisions in which jurisdiction was upheld where the non-resident defendant had no contacts with the state, but was personally served while: (1) on board a steamer docked in Boston Harbor; (2) on vacation in the state; (3) in the forum state for a few hours on business, and (4) passing through the forum state traveling to an adjoining state. Bernstine, *supra*, at 44-45. Perhaps the most notorious of these situations occurred in *Grace v. MacArthur*, 170 F.Supp. 442 (E.D. Ark. 1959). There, the doctrine reached the height of absurdity when the district court upheld jurisdiction based on service on the defendant while he was in an airplane passing over Arkansas because the territory of a state includes the air space above it.

The traditional rule has been applied after *Shaffer* to uphold jurisdiction in equally unfair situations. These

include when the defendant: (1) came as a tourist to Nevada to visit friends, *Cariaga v. Eighth Judicial Dist. Court*, 104 Nev. Adv. Ops. No. 82, 762 P.2d 886 (Nev. 1988); (2) came to Georgia one day to go bowling, *Humphrey v. Langford, supra*, 246 Ga. 732, 273 S.E.2d 22; and (3) went to Illinois to celebrate his parents' fiftieth wedding anniversary, *In re Marriage of Pridemore*, 146 Ill.App.3d 990, 497 N.E.2d 818, 100 Ill.D. 640 (Ill. Ct. App. 1986).

The traditional rule also conflicts with a lay person's intuitive sense of fairness. As Professor Schlesinger points out "[t]o civilians, who regard service with process as a procedural rather than a jurisdictional act, it is a strange thought an otherwise contactless forum may acquire jurisdiction in personam by the mere trick of handing a piece of paper to the defendant." Schlesinger, *supra*, at 317. Even one of the few academic defenders of transient jurisdiction concedes that its application should be tempered when it yields an unfair result. Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 Wash. U.L.Q. 671, 700. This concession underscores the fundamental unsoundness of the traditional rule in its pure form.

Finally, owning property in a state generally indicates a greater affiliation with it than temporary personal presence. It is therefore illogical to deny jurisdiction where the defendant owns property in the state, but to permit it simply because he was served while present there, even though the plaintiff's claim is unrelated to the defendant's contacts with the state. Posnak, *supra*, at 745-746.

Shaffer refused to permit jurisdiction where more affiliations existed between the state, the claim, and the defendant, than if jurisdiction had been based solely on personal service of the non-resident while present in the state. Even if disparate treatment were appropriate, personal service in the state provides less basis for jurisdiction than the presence of a defendant's property. Thus, logic suggests that if the permanent presence of property is not enough, then neither is the temporary presence of a

person who owns no property and has no lasting connection to the state.[8]

D. The Restatement Second of Conflicts of Law, Has Recently Recommended A Modification Of The Traditional Rule.

In response to *Shaffer*, the American Law Institute, as reflected in the Restatement (Second) of Conflict of Laws (1989) recently changed its view. Section 28 now states that "a state has power to exercise judicial jurisdiction over an individual who is present within its territory **unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable.**" Emphasis added. Comment b to section 28 notes that in *Shaffer*, the Court rejected the view that the mere presence of a thing in a state will always provide the state with a basis for jurisdiction. This comment also states that since the presence of property only gives the state jurisdiction to determine interests in the property where the exercise of such jurisdiction would be reasonable, "it must likewise follow that considerations of reasonableness qualify the power of a state to exercise personal jurisdiction over an individual on the basis of his physical presence within its territory."

The Restatement then sets forth examples of situations where jurisdiction should, and should not, be permitted. For instance, jurisdiction would be appropriate if the individual's relationship to the state could be described as "significant." This occurs where the defendant has been present "for a substantial period of time." Jurisdiction would also be appropriate if there were "some connection between the state and the particular transaction involved." On the other hand, jurisdiction

---

[8] The inadequacy of other justifications which have been offered for retaining the traditional rule are discussed in section I.E.

would be inappropriate where the sole basis for its exercise was the individual's momentary presence within the state, unless there were special circumstances which made jurisdiction reasonable. Such a special circumstance might exist when personal jurisdiction over the individual could not be obtained in any other state of the union.[9]

E. Decisions Which Have Applied The Traditional Rule After Shaffer Do Not Provide An Adequate Justification For Retaining It.

As Professor Schlesinger points out, once the restrictive rules emanating from *Pennoyer* were weakened, the main justification for transient jurisdiction was destroyed. "Within the limits of reason, state legislatures now may enable their courts to reach a nonresident defendant by substituted or constructive service. To the extent that the states make intelligent use of this newly won power, they are no longer in need of the substitute developed when they lacked the power. Hence, they should be able to give up the game of catching the transient." Schlesinger, *supra*, at 318.

Nonetheless, in spite of the logic of *Shaffer*, and the virtually unanimous recommendations of the commentators, the majority of courts have been unwilling to abandon the traditional rule, until this court decrees that they must. Thus, some justifications for the traditional rule have been offered, which do warrant specific comment.

One of the most frequently cited state court decisions is that of the Georgia Supreme Court in *Humphrey v. Langford, supra*, 246 Ga. 732, 273 S.E.2d 22. There, the plaintiff and defendant executed a contract in South Carolina, in which they were both residents. The plaintiff moved to Georgia, and filed a lawsuit concerning the contract. The

---

[9] In section II.E., Husband will explain why California would not have jurisdiction over him even under the Restatement's new formulation.

defendant was personally served when he came to Georgia one day to go bowling. The trial court relied on *Shaffer* and granted the defendant's motion to quash. In reversing, the Georgia Supreme Court distinguished this Court's decisions because none of them involved a defendant who was personally served in the forum. It stated: "To our knowledge, the United States Supreme Court has yet to reach [that] issue." 273 S.E.2d, at 24. It then offered the following defense of the traditional rule.

First, the court suggested that it is "not practical to have classifications of sojourners in the state." It was concerned with the difficulty in distinguishing between people who are merely "passing through", and people who have more of a connection to the state. At 24.

This concern simply reveals that due process can require thoughtful analysis in an area where "the grays predominate." See *Kulko v. California Superior Court*, 436 U.S. 84, 91-92 (1978). Although the traditional rule is easy to apply, due process cannot be sacrificed in the name of efficiency. *Shaffer v. Heitner, supra*, 433 U.S., at 211 [sacrificing fair play and substantial justice is too high a cost to pay for simplifying the jurisdictional inquiry]; *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) [due process clause was designed to protect citizens from an overbearing concern for efficiency]. Moreover, if efficiency were the goal, there would be no reason even to require that the non-resident be served in the state. A "bright line" rule could be that a state has jurisdiction over anyone who is personally served, regardless of where that occurred. No one could seriously suggest that such a rule would pass constitutional muster.

Second, the Georgia court stated that "plaintiffs have rights that must also be protected. 273 S.E.2d, at 24. A balancing of rights appears constitutionally fair." This concern is taken into account by the minimum contacts test of *International Shoe* and its progeny. It is the rule of transient jurisdiction which refuses to balance rights

because it allows the plaintiff to sue the defendant in any state where he can serve him personally, regardless of any other considerations.

Third, the court opined that the plaintiff does not really select the forum when the defendant comes to the plaintiff's home state of his own volition. At 24. This reasoning is unpersuasive because the defendant's only real decision is to come to the plaintiff's state. The defendant does not choose to be sued and served there. The plaintiff selects the forum as the place for litigation, and is able to use it whenever he catches the defendant present there.

Moreover, if voluntariness were the issue, there would have to be a subtle inquiry into whether the defendant's presence was truly voluntary, in many situations. For instance, if the only way to drive from California to the state of Washington is to drive through Oregon, is such a driver's presence in Oregon really voluntary in a sense that should allow Oregon to exercise personal jurisdiction?

Fourth, the opinion asserted, "This sovereign state has an adequate court system and is capable of rendering justice between litigants as well as any court system." At 24. This is a non sequitur. For the purpose of jurisdictional analysis, the question is not whether the forum state can, or will, achieve a just result on the merits. It is whether it is reasonable for the state to adjudicate the issue at all.

Finally, the opinion points out that a visitor is required to abide by the state's laws, and can be expected to be protected by them as well. "To accept the state's benefits and to avoid its responsibilities creates an imbalance which we cannot recognize." At 24. This seriously flawed argument draws on a comment by Justice Stevens

in his concurring opinion in *Shaffer*[10] See also, *Lockert v. Breedlove*, 361 S.E.2d 581, 585 (N.C. '87) and *Nutri-West v. Gibson*, ___ Wyo. ___, 764 P.2d 693, 696 (Wyo. 1988).

The use of a state's roads, access to police and fire protection if needed, and medical attention for an injury, are certainly benefits. The question is whether these benefits should subject the traveler to personal jurisdiction in a lawsuit which has nothing to do with any of them.

For instance, if Husband were injured in California, taken to a hospital, and then refused to pay the bill, the hospital could sue him in a California court for payment. Indeed, Husband could be served in New Jersey, yet required to defend that action in California. The reason is that jurisdiction would not be based on his physical presence, but would flow quite naturally from the relationship between the plaintiff, the defendant, the lawsuit and the state. In short, there would be a "nexus" between Husband's presence in California and the action. It would be quite another matter to use Husband's unexercised right to receive medical treatment in California as the basis for a lawsuit by his former wife to set aside a marital settlement agreement executed in New Jersey.

Moreover, it is unrealistic to assume that visiting a state gives rise to the "predictable risk" that if a person is served there, he will have to defend a lawsuit there. Only people versed in the arcane doctrine of transient jurisdiction would know, and could reasonably expect, that they might be required to defend litigation under such circumstances. It would be unreasonable to uphold the doctrine of transient jurisdiction based on the fiction that travelers

---

[10] Justice Stevens stated in *Shaffer*, 433 U.S., at 218:

> If I visit another state, or acquire real estate or open a bank account in it, I knowingly assume some risk that the state will exercise its power over my property or my person while there. My contact with the state, though minimal, gives rise to predictable risks.

should reasonably expect something of which they have no actual idea.[11]

Even if a traveler could predict that he might be served with a lawsuit if he crossed into another state, "actual notice, without more, has not been a basis for sustaining the assertion of state-court jurisdiction." Bernstine, *supra*, at 63-64.

Amusement Equipment, Inc. v. Mordelt, supra, 779 F.2d 264 is the other decision which is often cited as containing a defense of the traditional rule. Ironically, this opinion states that "we do not imply that proper service, without more, is in all cases sufficient." At 270, n. 15. Its reasoning reflects that the court of appeals was uncomfortable with pure transient jurisdiction, and reached its result by balancing various factors. The court upheld the exercise of jurisdiction there because it affirmatively answered the question "whether [the defendant] was in a relationship to the forum state that makes it ethical, not onerous, and fair, not oppressive, to subject him to the judicial arm of that state." At 271.

---

[11] Husband would have had even less reason to predict that he would be subject to marital litigation in California because the parties had settled their differences by entering into a written marital settlement agreement in New Jersey. This agreement stated that it would be interpreted according to New Jersey law, and that visitation disputes would be resolved by a New Jersey court. Thus, Husband had every reason to believe that any future litigation would be in New Jersey, not California. See, *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S., at 297 " . . . the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." See also, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 481 (1985) holding that a choice of law provision in a contract is a relevant consideration in making this determination.

In *Amusement Equipment, Inc.*, a German firm contracted with Amusement Equipment, Inc. to provide machinery for Amusement to display at a convention of the International Association of Amusement Parks and Attractions, to be held in Louisiana. The equipment did not arrive in time and Amusement filed an action in Louisiana. Mordelt, the general manager of the German firm, attended the convention and was served there. The district court quashed service on the ground that the exercise of transient jurisdiction was no longer valid.

The court of appeals reversed because it was "unwilling, absent explicit instructions from above, to ferry this rule across the River Styx. . . ." At 265. It assessed whether there was anything "unfair or unjust" in Louisiana exercising jurisdiction. At 270. It found that this was not unreasonable because Mordelt came to the convention, knowing that Amusement intended to display the equipment there. Therefore, it was "not so unpredictable as to be unfairly burdensome" to require Mordelt to defend a lawsuit there.

The court also justified its holding by twisting beyond recognition, *Shaffer*'s statement that jurisdiction can be exercised if it does not offend traditional notions of fair play and substantial justice. It reasoned that because presence in the state was a traditional basis for jurisdiction, relying on presence did not offend traditional principles of fair play and substantial justice. At 270. This reasoning is circular.

The court next reasoned that an exercise of jurisdiction is an exercise of state sovereignty, and that "if there is anything that characterizes sovereignty, it is the state's dominion over its territory and those within it." At 270. This, too, harkened back to the "presence" aspect of *Pennoyer*, which *International Shoe* rejected. It also missed the point that state sovereignty is limited by the due process clause of the Fourteenth Amendment, which protects individuals from a state's unfair exercise of its sovereignty. *Hanson v. Denckla,* 357 U.S. 235, 251 (1958) [due process not only protects defendants from inconvenience,

but is a limitation on state sovereignty], *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, (1980) [due process clause ensures that states "do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system"]. See also, *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-703, n. 10 (1982) where the Court explained that limits on personal jurisdiction are "ultimately a function of the individual liberty interest preserved by the due process clause."

The opinion next stated that "wholly apart from the significance of service of process, other factors strengthen our view that personal jurisdiction here is just and fair." 779 F.2d, at 270-271. It supported this conclusion by pointing out that Mordelt's presence in the state was purposefully related to his business. "This is not a case in which Mordelt, in a purely personal capacity, visited New Orleans just to see relatives or to enjoy the cooking of Antoine's." Moreover, the parties had entered into the contract in Florida. If Amusement Equipment had brought the action in Florida, a strong argument could have been made that jurisdiction would have been proper, even in the absence of personal service in the state. When the international nature of the transaction was considered, it mattered little whether Mordelt had to litigate in Louisiana, rather than in Florida.[12] At 271.

Finally, the opinion suggested that the defendant could be protected by other devices, such as forum non conveniens. At 271. This is not a realistic protection because it depends on the exercise of discretion. See

---

[12] One could therefore defend the result on the theory that a defendant who is not a citizen of the United States is subject to jurisdiction in any state, based on his "national" contacts, rather than on his specific contacts with the forum state. See Degnan and Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 Hastings L.J. 799 (1988).

Schlesinger, *supra*, at 315. A state that has already decided to protect its own citizens by deciding that it has jurisdiction over a defendant who has virtually no contacts with the state is similarly unlikely to dismiss on the ground that it is an inconvenient forum. Given the great deference which reviewing courts pay to a trial court's discretionary rulings, a refusal to dismiss on forum non-conveniens grounds is virtually immune from attack. The due process rights of a defendant should not rest on such a slender reed.

Conclusion

The case for abolishing transient jurisdiction is overwhelming. Husband submits that the time has come for this Court to do so. He will next demonstrate that regardless of what this Court does to the traditional rule, there are compelling reasons for holding that a state cannot exercise personal jurisdiction over a parent who is served while he is visiting his children there.

II. PERSONAL JURISDICTION SHOULD NEVER BE PREDICATED ON SERVICE ON A NON-RESIDENT PARENT WHILE HE IS IN THE FORUM TO VISIT HIS CHILDREN BECAUSE THIS WOULD GRAVELY INTERFERE WITH HIS FUNDAMENTAL RIGHT TO BE INVOLVED IN THEIR UPBRINGING.

Introduction

If this court were to reject the doctrine of transient jurisdiction entirely, and to hold that all assertions of state court jurisdiction must satisfy the minimum contacts test, then California would not have jurisdiction over Husband in this case. See discussion in section II.E. below. On the other hand, this court may wish to take an intermediate position. The question would then become how to decide what, if any, significance should be given to the fact that a non-resident was served while he was present in the state.

In some situations, such as when a non-resident is served in an airplane flying over the state, or while changing planes at an airport, or where neither the plaintiff, the defendant, nor the events giving rise to litigation, has any connection with the forum, it seems apparent that the state should not be able to exercise personal jurisdiction. On the other hand, there could be situations where the non-resident's contacts with the state are insufficient under a minimum contacts analysis, yet service while he was present might tip the balance sufficiently to allow the exercise of jurisdiction, despite due process and fairness concerns.

Husband will now explain why, regardless of which view the court adopts, or even if it retains the traditional doctrine, it should hold that service on a non-resident parent, while he is in a state to spend time with his children, should never be a permissible basis for exercising personal jurisdiction. This rule is necessary to protect the fundamental constitutional right of divorced parents to remain involved in raising their children. It is especially appropriate in this case because the gravamen of Wife's action is an attack on the validity of the parties' written marital settlement agreement, which they executed in New Jersey before she moved to California with the children.[13]

A. Whether A State Can Exercise Personal Jurisdiction Over A Non-Resident Defendant Depends, In Part, On The Impact That This Would Have On His Fundamental Rights.

In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987) the Court recognized that a variety of factors must be considered in determining whether a state has personal jurisdiction over a non-resident defendant.

---

[13] Wife has the right to have California dissolve the marital status without personal jurisdiction over Husband. *Williams v. North Carolina*, 317 U.S. 287 (1942). Similarly, the Uniform

(Continued on following page)

These include "the shared interest of the several states in furthering fundamental substantive social policies." At 113, citing *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S., at 292.

Bendix Autolite Corp. v. Midwesco Enterprises, 108 S.Ct. 2218 (1988) also supports the view that the existence of a competing constitutional right, can preclude an otherwise permissible exercise of personal jurisdiction over a non-resident. It held that an Ohio law which tolled the statute of limitations during any period that a person or corporation was not "present" in the state, was unconstitutional. It reached that result, in significant part, based on Ohio's requirement that a foreign corporation appoint a resident agent for service of process, in order to be protected by the statute of limitations in the first place. This conduct automatically subjected the corporation to general jurisdiction for all transactions, including those "in which it did not have the minimum contacts necessary for supporting personal jurisdiction . . . " The Court held that such exposure to general jurisdiction imposed an impermissible burden on the corporation's rights under the commerce clause, and was therefore unconstitutional. 108 S.Ct., at 2220-2222.

These decisions demonstrate that in deciding whether a state can exercise personal jurisdiction over a non-resident defendant, one should consider whether to do so would adversely affect other fundamental social policies and/or constitutional rights. Such a competing fundamental policy is implicated here – a policy of

---

(Continued from previous page)

Child Custody Jurisdiction Act gives a state subject matter jurisdiction to adjudicate child custody and visitation under appropriate circumstances. This does not give it jurisdiction over any other issue. *Kumar v. Superior Court*, 32 Cal.3d 689, 695-702, 652 P.2d 1003, 186 Cal.Rptr. 772 (1982).

constitutional dimensions that must be accorded substantial weight under preexisting authority and present policy. The exercise of transient jurisdiction here adversely affects a parent's right to be involved in raising his children. It flies in the face of strongly held public policy, and imposes an unwarranted and unconstitutional infringement of Husband's fundamental parental rights, to require him to submit to general jurisdiction in California as the price for spending time with his young children.

B. Allowing Personal Jurisdiction To Be Based On Service On A Parent While He Is Present In A State To Spend Time With His Children Is An Unwarranted Interference With His Fundamental Parental Rights And Conflicts With Strong Social Policy Designed To Further The Best Interests Of Children.

1. The Due Process Clause Of The Fourteenth Amendment Protects The Right Of A Divorced Father To Be Involved In Raising His Children.

In *Stanley v. Illinois, supra,* 405 U.S. 645 the Court concluded that the Fourteenth Amendment gives an unmarried father a due process right to a hearing regarding his fitness as a parent, before he can be deprived of his parental rights. It reached this result, in part, by recognizing that a parent's interest in his children "undeniably warrants deference and, absent a powerful countervailing interest, protection." At 651. It described a parent's interest in the companionship, care, custody, and management of his children, as being more important than interests which derive from economic arrangements. *Ibid.* See also *Kulko v. California Superior Court, supra,* 436 U.S. 84, at 97 which similarly distinguished between a defendant's commercial activities and matters arising out of a domestic dispute.

Stanley relied on numerous decisions protecting similar interests under the Fourteenth Amendment. For instance, *Stanley* noted that the right to conceive and raise one's children is "essential", citing *Meyer v. Nebraska,* 262 U.S. 390, 399, (1923), "a basic civil right", citing *Skinner v. Oklahoma,*

316 U.S. 535, 541 (1942), and a right which is "far more precious than property rights", citing *May v. Anderson,* 345 U.S. 528, 533 (1953). At 651.

This view was reiterated recently in *Michael H. v. Gerald D.,* 109 S.Ct. 2333 (1989). It pointed out that there is a long history which recognizes constitutional protection for certain fundamental parental rights, citing *Quilloin v. Walcott,* 434 U.S. 246 (1978), *Caban v. Mohammed,* 441 U.S. 380 (1979), and *Lehr v. Robertson,* 463 U.S. 248 (1983).[14] At 2342.

A majority of the court found that no such interest was present on the unusual facts in *Michael H.,* because the man was attempting to establish parental rights with a child living in an intact family, based on an affair he had with the mother. Nonetheless, even the lead opinion recognized that the due process clause provides protection to interests which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and which reflect the "basic values that underlie our society".[15] At 2342.

A divorced father who has been involved in raising his children since their birth unquestionably has a

---

[14] *Quilloin* observed that this Court had " . . . recognized on numerous occasions that the relationship between parent and child is constitutionally protected." 434 U.S., at 255. *Lehr* explained that "the intangible fibers that connect the parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." 463 U.S., at 256.

[15] The dissenting opinions agreed on this point. "Where the interest under consideration is a parent-child relationship, we need not ask, over and over again, whether that interest is one that society traditionally protects." At 2352 (Brennan, J., dissenting). "Prior cases here have recognized the liberty interest of the father in his relationship with his child." At 2360 (White, J., dissenting).

fundamental constitutional right to continue parenting his children. Thus, in considering whether California can exercise personal jurisdiction over a parent based on the fact that he was served while in a state to spend time with his children, it is necessary to consider the degree to which this would burden the exercise of that right.[16]

2. All States Share The Strong Social Policy Of Encouraging Divorced Parents To Maintain An Ongoing Relationship With Their Children.

All states recognize that the best interests of children is furthered by encouraging divorced parents to maintain an ongoing relationship with their children. This policy has been emphasized in California. For instance, in *Kumar v. Superior Court, supra,* 32 Cal.3d 689, at 703-704, 652 P.2d 1003, 186 Cal.Rptr. 772, the California Supreme Court held that California did not have personal jurisdiction over a parent whose only contacts involved his efforts to spend time with his children there. In *Kumar*, the father was not served while he was in California. He had, however, invoked the California courts to enforce his visitation rights with his children. The mother argued that this should constitute a general appearance. 32 Cal.3d, at 703. The California Supreme Court rejected her position. It refused to permit California to exercise personal jurisdiction because the father's "connection with the state resulted from an effort to encourage visitation." At 703-704. See also Cal. Civ. Code § 4600 (Deering 1989 Supp.) it is "the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage. . . ."

---

[16] In section II.C.2., Husband will set forth specific examples of how upholding California's exercise of personal jurisdiction would impose an undue burden on his exercise of fundamental parental rights.

In *Titus v. Superior Court*, 23 Cal.App.3d 792, 801-805, 100 Cal.Rptr. 477 (Cal. Ct. App. 1972) the California Court of Appeal similarly quashed service over a non-resident father, stating: "It is a strong policy of the law to encourage the visitation of children with their parents. Such a policy should be fostered, rather than thwarted." 23 Cal.App.3d, at 803. Reaching the same conclusion, the court in *Judd v. Superior Court*, 60 Cal.App.3d 38, 45, 131 Cal.Rptr. 246 (Cal. Ct. App. 1976) stated: "It should be a matter of strong public policy to encourage the payment of support and communication between a natural father and his children, not to discourage the same by subjecting the father to the expense and inconvenience of relitigating this matter of support in our state."

In none of the foregoing situations was the father served in California. Nonetheless, this additional factor did not yield a different result in *In re Marriage of Malak*, 182 Cal.App.3d 1018, 227 Cal.Rptr. 841 (Cal. Ct. App. 1986). There, the non-resident father was personally served while he was present in California to enforce his parental rights. At 1021. The California Court of Appeal upheld the trial court's ruling that California did not have personal jurisdiction, without even discussing transient jurisdiction. At 1023-1024.

Virtually every state has enacted the Uniform Child Custody Jurisdiction Act (hereafter "UCCJA"). See list in Am.Jur.2d Desk Book, Item 124. Cal. Civ. Code §§ 5150, et seq. (Deering 1984). It delineates the circumstances under which a state can exercise jurisdiction over issues relating to custody and visitation. See, e.g., Cal. Civ. Code § 5152 (Deering 1984). The UCCJA explicitly excludes jurisdiction to decide issues relating to child support. See, e.g., Cal. Civ. Code § 5151(2). (Deering 1984.)

Thus, the states have recognized that for jurisdictional purposes issues relating to the parent/child relationship should be kept separate from financial issues. This policy would be defeated if a state exercised subject matter jurisdiction under the UCCJA to resolve a custody dispute, and personal jurisdiction could be obtained over

the non-resident parent because he could be served while in the state solely for a custody hearing.

C. Allowing Personal Jurisdiction To Be Based On Service While A Parent Visits His Children Would Produce Undesirable Results.

1. Allowing Such Jurisdiction Places The Non-Resident Parent In An Intolerable Position And Undermines The Ability To Settle Marital Disputes.

It is Husband's position that, as a general principle, personal jurisdiction should never be allowed when it is predicated on service on a non-resident parent, when he is present in a state to spend time with his children. Such visitation should be considered to be in a "safe harbor" or a "sanctuary".

If this is not the case, the out-of-state parent must make a Hobson's choice: Either he will decide not to travel to spend time with his children because of fear that he will become embroiled in litigation, or his visits will become occasions during which he cannot devote his energy to his children because he must be involved in defending against a lawsuit. In either situation, the result is to impose a chilling effect on the non-custodial parent's constitutional right to participate in raising his children.

Permitting such exercise of jurisdiction would also deter spouses from settling their marital disputes in a manner which permits the custodial parent to move to another state. It is not uncommon for a spouse to have second thoughts and try to have a marital settlement agreement set aside. See, e.g., *In re Marriage of Stevenot*, 154 Cal.App.3d 1051, 202 Cal.Rptr. 116 (Cal. Ct. App. 1984). The parent who remains in the state of the marital domicile will fear that once the other parent has left, he or she will try to upset their agreement and obtain an advantage from being in a new jurisdiction, as Wife is attempting to do here. Spouses should be encouraged to

settle their marital problems expeditiously, without adversarial litigation that can harm the children, and with finality. These goals would be discouraged if marital wounds can be easily reopened in a foreign forum.

This approach follows implicitly from this Court's decision in *Kulko v. California Superior Court, supra*, 436 U.S. 84. The Court held that California did not have personal jurisdiction over the father, in the mother's action to modify child support, because he did not have sufficient contacts with California. He had simply helped his daughter move from New York to California, to live with the mother. At 87-88. It is difficult to assert in any logical fashion that the result would have been different if, instead of buying a ticket and placing his daughter on an airplane in New York, the father had accompanied her to California and been personally served in the process.

Kulko also held that the California Supreme Court had correctly refused to exercise personal jurisdiction on the basis that the father allowed the children to live with the mother in California for three months each year, under the parties' original agreement. As the court observed, allowing jurisdiction to be based on such a ground could "arbitrarily subject one parent to suit in any state of the union where the other parent chose to spend time while having custody of their offspring pursuant to a separation agreement." At 93. That very possibility of arbitrariness is implicated here as well.

There is no reason to allow a mother to escape from the unfairness which the Court perceived in *Kulko*, by the device of personally serving the father when he comes to California to spend time with his children.

2. Application Of The Rule Husband Advocates Is Especially Necessary In The Present Case.

a. The Burnham children are now only 3 and 9 years old. They live 3,000 miles away from their father and the youngest cannot fly unaccompanied. As a practical matter, Husband will lose contact with them during their

important formative years, if he cannot safely come to California to spend time with them.

It is expensive and inconvenient for Husband to travel to California, and he is unable to do it frequently. Whatever time he is able to spend with his children there is precious. Husband should not have to visit them under the pall of attending to Wife's litigation while he is in California. His trips to California to spend time with his children should not have to become a nightmare, filled with depositions, court appearances, and other matters related to Wife's lawsuit.

Moreover, family law litigation does not end with the initial trial. There can be successive hearings on support modification, until Husband's obligations cease. Thus, he would be subject to repeated court battles in California, even if the marital settlement agreement is upheld.

b. Husband was unwilling to agree that Wife could be the custodial parent, and move across the country with the children, unless she guaranteed him liberal visitation rights. Their marital agreement provided for this, and also that any disputes concerning visitation would be resolved by the New Jersey court. When Wife filed this action in California, she requested custody over the children, but no provision for visitation. The parties have had ongoing visitation disputes since Wife moved to California.

Under California law, Husband cannot obtain a court hearing to obtain a visitation order, until both parents participate in mediation. Cal. Civ. Code § 4607. (Deering 1989 Supp.) Unless the rule Husband advocates is adopted, Wife could serve him at the mediation.

Moreover, California does not recognize an immunity from service, while a person is present in connection with other litigation. *Silverman v. Superior Court*, 203 Cal.App.3d 145, 149, 249 Cal.Rptr. 724 (Cal. Ct. App. 1988). Therefore, if Husband came to California for mediation of visitation disputes, he could be served in a lawsuit by anyone else who purports to have a claim against him.

c. Wife's action is far from limited to disputes involving their children. Her primary goal is to have a California court invalidate the marital settlement agreement, which the parties executed in New Jersey. That litigation promises to be complex and to involve numerous issues in which California has no interest. All of the events surrounding the threshold issue of the validity of the agreement occurred in New Jersey. If the agreement is set aside, there will have to be a full trial on all of the issues concerning property characterization, valuation, and division. All the evidence regarding this is also in New Jersey.

The lawsuit should be in New Jersey. See *Kulko v. California Superior Court, supra*, 436 U.S., at 97, where the Court recognized that personal jurisdiction was inappropriate where the wife sought to use a California court to modify an agreement executed in New York.

d. This is not a situation in which one of the parents moved to another state before matters were settled. In many situations, the plaintiff and defendant live in different states when the events giving rise to the plaintiff's cause of action occur. In that situation, one of them will have to appear in a foreign state, if their dispute results in litigation. By contrast, if Wife was under duress when she signed the agreement, she must have known this before she left New Jersey. Thus, her cause of action arose before she left New Jersey and she could have litigated it there before she left. She can still do so now. Wife is actively represented by counsel in New Jersey, through whom she has been resisting Husband's efforts to have matters resolved there. (JA 17.)

Allowing Wife to obtain personal jurisdiction over Husband to litigate this issue in California, by serving him when he was present there to spend time with the children, is the very antithesis of fair play and substantial justice. As this Court pointed out in *Kulko, supra*, 436 U.S., at 97, "basic considerations of fairness point decisively in favor of [Husband's] state of domicile as the proper forum for adjudication of this case, whatever the merits

of [Wife's] claim. It is [Husband] who has remained in the state of the marital domicile where it is [Wife] who has moved across the continent."

D. State Court Decisions Which Have Upheld Transient Jurisdiction In A Family Law Context Have Not Given Any Reasons in Defense Of It.

A few state courts have upheld transient jurisdiction in a family law context. None has offered a reasoned defense for doing so. None has considered the chilling effect on the exercise of fundamental parental rights, or the detrimental effect on the children. Instead, they have applied the traditional rule unthinkingly, based on its application in other situations, and on the fact that this Court has yet to explicitly reject the doctrine.

In light of the extensive academic criticism of the rule, it is surprising that so few courts have been willing to depart from it. Perhaps this state of affairs is an indication of how each state is overly concerned with protecting its own residents, rather than observing constitutional limits.

For instance, in *Hutto v. Plagens*, 254 Ga. 512, 330 S.E.2d 341, (Ga. 1985) the parties divorced in South Carolina in 1975. The mother was awarded custody, and the father was given reasonable visitation rights. The mother moved to Georgia and served the father with a petition for modification of child support, while he was there visiting the children. The Georgia Supreme Court upheld personal jurisdiction on the ground that service on a non-resident while he is physically present in the state is sufficient under the traditional rule. It simply followed its decision in the non-family law case of *Humphrey v. Langford, supra*, 246 Ga. 732, 273 S.E.2d 22, which is discussed above in section I.E. See also, *Gant v. Gant*, 254 Ga. 239, 327 S.E.2d 723 (Ga. 1985) and *Browne v. Browne*, 258 Ga. 636, 373 S.E.2d 367 (Ga. 1988) which reached a similar result based on *Humphrey*.

In re Marriage of Pridemore, supra, 146 Ill.App.3d 990, 497 N.E.2d 818 upheld jurisdiction in the wife's action to increase child support, after the husband was served while he was in the state to celebrate his parent's 50th wedding anniversary. The opinion relied on the Georgia decisions discussed above without analysis. 497 N.E.2d, at 820.

Brookshire v. Brookshire, 89 N.C.App. 48, 365 S.E.2d 307, 311, (N.C. Ct. App. 1988) held that North Carolina had personal jurisdiction over a father served while visiting his children and parents in the state. It simply relied on a North Carolina Supreme Court decision, which had upheld the validity of transient jurisdiction in a commercial context, *Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581, (N.C. 1987). See also *Jenkins v. Jenkins*, 89 N.C.App. 705, 367 S.E.2d 4, (N.C. Ct. App. 1988) and *Morris v. Morris*, 91 N.C.App. 432, 371 S.E.2d 756 (N.C. Ct. App. 1988) which reached the same result.

In *Swarts v. Dean*, 13 Kan.App.2d 228, 766 P.2d 1291 (Kan. Ct. App. 1989), the parents married in Kansas and divorced in Texas in 1976. The mother returned to Kansas with the children. In 1988, the mother filed a motion to increase child support, and served the father while he was visiting the children in Kansas. The Court of Appeal upheld the exercise of personal jurisdiction relying on *Pridemore, Lockert* and *Jenkins*.

By contrast, the Washington Court of Appeal relied on *Shaffer* and refused to apply transient jurisdiction in a family law context in *Bershaw v. Sarbacher, supra*, 40 Wash.App. 653, 700 P.2d 347. There, a paternity action was served on the non-resident defendant while he was visiting the mother and the child. The trial court granted his motion to dismiss for lack of personal jurisdiction, and the Washington Court of Appeals affirmed. 700 P.2d, at 349. See also *In re Marriage of Markowski*, 50 Wash.App. 633, 749 P.2d 754, 756 n. 2 (Wash. Ct. App. 1988). For the reasons explained throughout Husband's brief, this is the better rule.

E. The Fact That Husband Arranged To Attend Business Events When He Came To Visit His Children Does Not Permit California To Exercise Personal Jurisdiction Over Him.

1. When Husband Was Served, He Was In California To Spend Time with His Children.

The California Court of Appeal seemed to think that exercising personal jurisdiction would not discourage Husband from spending time with his children because he was coming to California for business reasons anyway. (JA 35.) This is incorrect because Husband simply arranged to attend events in California, such as trade shows and lectures, in order to minimize the expense of coming here to spend time with his children, by taking advantage of the income tax laws. (JA 30-31.) Indeed, Wife served him at her home.

If Husband had been aware that attending business related events would subject him to Wife's litigation in California, he could have chosen not to go to them. They certainly were not important enough to bring Husband to California, if his children did not live here. His reason for coming to California was to spend time with his children.

2. California Does Not Have Personal Jurisdiction Over Husband In Wife's Family Law Action, On The Basis Of His Few Business Contacts With California.

Husband's business contacts in California were insufficient to satisfy the minimum contacts test for personal jurisdiction for two reasons.

First, doing a limited amount of business in a state only permits the state to exercise personal jurisdiction over a non-resident defendant on a cause of action arising out of that business. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). See also, the California Judicial Council Comments to California's long arm statute, Cal. Code Civ. Proc. § 410.10 (West 1973).

Wife's family law action certainly does not arise out of Husband's business contacts with California. See, e.g., *Judd v. Superior Court, supra*, 60 Cal.App.3d, at 44, 131 Cal.Rptr. 246, where the California Court of Appeal made this point in the context of a family law action. California has also recognized that it cannot exercise personal jurisdiction over a parent who combines trips there to spend time with his children with some business. *Modlin v. Superior Court*, 176 Cal.App.3d 1176, 1179-1182, 222 Cal.Rptr. 662 (Cal. Ct. App. 1986).

Second, Husband's limited business in California is insufficient to give the state "general" jurisdiction over him to adjudicate a cause of action that does not arise out of it. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-416 (1984) for a discussion of the difference between general and specific jurisdiction. General jurisdiction only exists when the non-resident's business contacts with the forum state are "wide-ranging, continuous, and substantial." *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-449 (1952). That is far from the situation here. For example, in *Cornelison v. Chaney*, 16 Cal.3d 143, 146-149, 545 P.2d 264, 127 Cal.Rptr. 352 (1976) the California Supreme Court recognized that it would be unconstitutional to exercise general jurisdiction over a non-resident defendant who had an abundance of business contacts with California, which were considerably more extensive than Husband had here.

Indeed, the trial court originally concluded that California did not have personal jurisdiction over Husband. (JA 21-22.) Wife's motion for reconsideration strongly argued that the minimum contacts test did not have to be satisfied because Husband was personally served while he was physically present in California. (Doc. #12, pp. 4:14-8:19.) The trial court then changed its ruling. (JA 26.) Thus, if Husband had not been served in California, his challenge to jurisdiction would have been sustained. Husband's physical presence in

California – not his business contacts there – were the key to the trial court's legal ruling.[17]

The Court of Appeal explicitly stated that California's exercise of personal jurisdiction over Husband was proper because service on a non-resident defendant while he is present in the state remains sufficient after *Shaffer*. (JA 34.)

Finally, if the new standard suggested in the Restatement (Second) of Conflicts of Law § 28 were applied, personal jurisdiction over Husband would still be improper. When all of the factors discussed throughout this brief are considered as a whole, asserting personal jurisdiction over Husband in Wife's action would be unreasonable.

Husband was not present in California for a "substantial" period of time. There is no connection between Husband's presence and Wife's attack on their marital settlement agreement. The minimal business contacts husband had with California are not related to Wife's lawsuit in any manner. Husband is available for service

---

[17] The trial court's order stated that it had also considered a New Jersey order dismissing Husband's divorce action there. (JA 26.) Nothing in that order adjudicates whether California can exercise personal jurisdiction over Husband. (Doc. #12, Ex. pp. 1-11.) The sole issue before the New Jersey court was whether Husband's divorce action should be dismissed because he had not complied with a New Jersey statute requiring a summons to be served within ten days after it is issued. (*Id.*, pp. 1-2.)

The only part of the New Jersey order which touches on jurisdiction is a comment regarding where custody and visitation should be litigated under the UCCJA. (*Id.*, pp. 7-10.) The court indicated that those issues should be resolved in California. (*Ibid.*) Which state would be a better forum for those issues, under the subject matter jurisdiction given by the UCCJA, has nothing to do with the constitutional issue of personal jurisdiction. See *Kumar v. Superior Court, supra*, 32 Cal.3d, at 695-704, 186 Cal.Rptr. 772, 652 P.2d 1003, where the California Supreme Court made this very distinction.

in New Jersey. It is a completely appropriate state in which to litigate the validity of the parties' agreement, which was executed there.

CONCLUSION

For the foregoing reasons, and based on the cited authorities, it is respectfully submitted that this Court instruct the California Court of Appeal to issue a writ of mandate, compelling the California Superior Court to grant Husband's motion to quash for lack of personal jurisdiction, or that this court itself direct the Superior Court to do so.

Respectfully Submitted,

DE GOFF AND SHERMAN

by RICHARD SHERMAN
Counsel of Record
and VICTORIA J. DE GOFF